Supreme Court, U.S.
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No. 01-801

IN THE

Supreme Court of the United States

ARTHUR HARVEY, M.D., individually and as beneficiary of the Arthur Harvey, M.D. Inc. Employee Defined Benefit Plan, and CECILIA M. CROWE, as Guardian ad Litem for DOLORES THOMAS,

Petitioners,

v.

SALOMON SMITH BARNEY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court – following its long-standing precedent – unanimously ruled that the arbitrability of a dispute presents a question for the courts, rather than one to be decided by arbitrators, unless there is clear and unmistakable evidence that the parties agreed to allow the arbitrators to decide that question. The Eleventh Circuit's opinion faithfully applied *First Options*: after reviewing the arbitration agreement and finding no clear and unmistakable evidence of an intent to allow the arbitrators to decide the arbitrability of the dispute, the court held that the issue was properly decided by the courts.

The Eleventh Circuit's ruling is unexceptional and its decision has no far-reaching implications to arbitration law. Petitioner merely seeks to have this Court review several provisions of the parties' arbitration agreements and the National Association of Securities Dealers ("NASD") Code of Arbitration Procedures, a Code which is subject to ongoing review and revision by the NASD.

The question presented is:

Whether the Eleventh Circuit properly interpreted the parties' arbitration agreement to find that there is no clear and unmistakable evidence authorizing the arbitrators to decide the arbitrability of the dispute.

STATEMENT PURSUANT TO RULE 29.6

Salomon Smith Barney, Inc. is wholly owned by Salomon Brothers Holding Co. Inc. which in turn is wholly owned by Salomon Smith Barney Holding Inc. which is wholly owned by Citigroup Inc., a publicly traded company.

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STATEMENT OF THE CASE

Due to Petitioners' procedural jockeying, this case has a somewhat tortured procedural history that began in July 1997, when Petitioners joined a pending National Association of Securities Dealers ("NASD") arbitration claim initially filed by another claimant (who was not a party to the proceedings in the lower courts). App. 2.[1] That arbitration proceeding was administered in Boca Raton, Florida. None of the Petitioners had any relationship to the original NASD claimant. Rather, "[e]ach of the [NASD Claimants was] a separate investor with [Salomon Smith Barney, Inc. ("Smith Barney")]. Each resides in a different state, and each made different investments through Smith Barney at a separate time and place, without any then existing legal connection with any of the other [Claimants]." *Potter*, 725 So. 2d at 1224. Moreover, Petitioners are not from Florida and this claim has no relationship to that state.

Petitioners' NASD claims involve allegations that certain limited partnerships purchased between 1985 through 1990 "were unsuitable and inappropriate for the investment objectives of the [Petitioners]." App. 2.[2] They initiated the

1. Indeed, a Florida appellate court described Petitioners' maneuverings as the "rankest forum shopping by out-of-state interests." *Smith Barney Inc. v. Potter*, 725 So. 2d 1223, 1226 (Fla. 4th DCA 1999).

2. Smith Barney requested that the NASD sever the Petitioners' claims because Petitioners reside in different states and made different investments. App. 2. The NASD Director of Arbitration granted the request to sever the Petitioners' claims. *Id.* Petitioners then persuaded the arbitrators to reconsider the severance order. Upon reconsideration, the arbitrators disregarded the NASD Director's prior ruling and permitted the Petitioners to proceed in a single arbitration. *Id.*

litigation over the interpretation of the NASD Code when "[s]imultaneous with the filing of [their] NASD claim, [Petitioners] filed a state court action in Broward County, Florida," seeking "a declaration that the NASD panel, not the courts, should rule on the six-year eligibility requirement articulated in the NASD Code of Arbitration." App. 3.

Section 10304 of the NASD Code of Arbitration, which provision Petitioners had agreed would govern their claims,[3] includes the following eligibility provision:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

App. 6.[4]

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3. Petitioner Harvey signed several arbitration agreements providing for NASD arbitration. Petitioner Thomas did not execute any pre-dispute arbitration agreement with Smith Barney. Instead, Thomas relied on the NASD Code itself as the arbitration agreement. Petition at 6, 6 n.5. Several courts have ruled that the NASD Code imposes an obligation on NASD members to arbitrate with their customers because the customers are third-party beneficiaries of the NASD Arbitration Code. *See, e.g., Scobee Combs Funeral Home, Inc. v. E.F. Hutton & Co.*, 711 F. Supp. 605, 608 (S.D. Fla. 1989) (where no written pre-dispute arbitration agreement existed between NASD members and a customer, the NASD Code was "binding on Defendants and . . . the customer, Scobee, an intended third-party beneficiary, has standing to enforce that provision against them.").

4. The six-year limit imposed by the NASD eligibility rule is the longest length of time that brokerage firms are mandated by the rules of the Securities and Exchange Commission to maintain their customer documents. *See, e.g.*, 17 C.F.R. § 240.17 a-4.

In Petitioners' state court action, Smith Barney asserted that the case should be severed and/or dismissed on grounds of *forum non conveniens* because of Petitioners' lack of any relationship with Florida. App. 3. The trial court denied Smith Barney's motion. *Id.* The matter made its way to the Florida Fourth District Court of Appeal, which reversed the trial court upon a holding that Petitioners had engaged in impermissible forum shopping. *Potter*, 725 So. 2d at 1226-27. The Fourth District directed the trial court on remand to enter orders to ensure that Petitioners could reinstate their cases in an alternative forum. *Id.* at 1227.

Despite that ruling, Petitioners did not attempt to refile their claims in an alternative forum; rather, they continued to press the Florida arbitration. Armed with the Fourth District's ruling, Smith Barney requested that the arbitrators sever the Petitioners' claims in the arbitration proceeding. The arbitrators, however, refused to sever the claims. App. 3.

Smith Barney then instituted an action in the Southern District of Florida, seeking to enjoin the arbitration on the ground that the claims were ineligible for arbitration under the NASD's six-year eligibility rule, as set forth in NASD Code Section 10304. App. 4.[5] Smith Barney asserted that Section 10304 creates an arbitrability issue that, under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), was for the court to decide.

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5. Smith Barney filed its action in the Southern District of Florida because, under extant law, it was required to institute its action in the district in which the arbitration was pending. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995).

The district court ruled that Section 10304 addresses the issue of arbitrability and that it was for the court to decide whether Petitioners' claims were ineligible for arbitration. The court granted Smith Barney's motion for a preliminary injunction to preserve the status quo pending a determination of the threshold arbitrability issue. App. 4. The parties then cross-moved for summary judgment on the issue of whether the Petitioners' claims were eligible for arbitration under Section 10304. *Id.* Finding that all of Petitioners' claims arose from the point of sale of the limited partnerships, which had occurred more than six years before they filed their arbitration claim, the district court permanently enjoined Petitioners' arbitration claims as ineligible for arbitration. *Id.*[6]

On appeal, the Eleventh Circuit, faithfully applying this Court's *First Options*, decision, held that the parties' arbitration agreement did not reflect clear and unmistakable evidence of the parties' intent to allow the arbitrators to decide the arbitrability of the dispute. App. 5-11. The court accordingly ruled that the district court properly had determined that the issue of arbitrability was for the court to decide. App. 11.

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6. Petitioner Thomas sought the appointment of a guardian ad litem – at Smith Barney's expense – prior to the court's ruling on the summary judgment motions. *Id.* The magistrate judge granted Thomas's motion for appointment of a guardian ad litem, but denied her request that Smith Barney pay the expenses of the guardian. *Id.* Thomas did not attempt to name a guardian ad litem, pursuant to the terms of the magistrate judge's order, until almost one month after the district court had granted Smith Barney's summary judgment motion; the district court granted the motion to appoint the named guardian ad litem. App. 28-29.

The Eleventh Circuit further held that the district court properly had analyzed the question whether Petitioners' claims were eligible for submission under the NASD six-year eligibility rule. App. 6-8. The court rejected Petitioners' argument that the district court improperly had passed upon the merits of the underlying case. *Id.* at 8. ("Under the facts of this case, we hold that the District Court did not abuse its discretion in making its findings, nor did the District Court improperly pass upon the merits of the case.").[7]

REASONS FOR DENYING THE WRIT

The legal principles underpinning the Eleventh Circuit's ruling were announced – and have repeatedly been affirmed – by this Court. As a fundamental starting point, "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citations and internal quotations omitted). Three years after pronouncing this principle, the Court reiterated the rule in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), holding that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," but that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478 (citations and internal quotations omitted).

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7. The Eleventh Circuit also concluded that the district court properly had dealt with the guardian ad litem issue, in particular because Thomas had delayed the selection of a guardian. App. 10-11. See n.6, *supra*.

> Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479.

As the Court noted in *AT&T*: "[T]he principles necessary to decide this case are not new. They were set forth over 25 years ago in a series of cases known as the "Steel Workers Trilogy," i.e., *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *AT&T*, 475 U.S. at 649. The Court reiterated that the question whether the parties had agreed to arbitrate a dispute was for the court to decide:

> [T]he question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Id. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582-83 and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds, Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970)). The Court accordingly

held that it was "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate." *Id.* at 651.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court unanimously set forth the standards for determining whether the courts or the arbitrators are to decide the issue of arbitrability. The Court held that the courts decide whether the parties have agreed to arbitrate a dispute unless there is "clear and unmistakable evidence" that the parties agreed to have the arbitrators decide the issue. *Id.* at 944 (quoting *AT&T*, 475 U.S. at 649). If the arbitration agreement is silent or ambiguous, *the courts are to decide the issue of arbitrability*. *Id.* at 944-45. The Court noted

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (citations omitted).

This case presents nothing more than a proper application of this Court's decisions by the Eleventh Circuit. The governing precedent summarized above has created four primary rules: (1) arbitration is a matter of contact; (2) a party can not be required to submit to arbitration a dispute it has not agreed to arbitrate; (3) the courts generally decide arbitrability, i.e., whether the parties have agreed to submit

a dispute to arbitration; and (4) it is only when there is clear and unmistakable evidence of an intent to allow the arbitrators to decide the issue that the courts should not decide arbitrability. The Eleventh Circuit's opinion, holding that the courts properly are to decide the arbitrability of the dispute between Smith Barney and Petitioners – based on the particular language of the agreements between the parties, which does not reflect the requisite clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability – is a correct application of these rules.

There is no need for the Court to revisit these principles of arbitration law. While the Circuits are admittedly split on the interpretation of the NASD Code's language and the interplay of that language with the provisions of various arbitration agreements, there is no broad national rule that could emerge from this case – which is, after all, merely a case of contract interpretation.

I. The Eleventh Circuit Properly Applied *First Options*.

The Eleventh Circuit was presented with an issue of arbitrability. The very wording of NASD's six-year rule, stating that "no dispute . . . shall be eligible for submission under this Code," § 10304, NASD Code of Arbitration Procedure, makes this clear. As *First Options* noted, the issue of arbitrability focuses on whether the parties agreed to arbitrate the merits of the dispute. 514 U.S. at 942. The question whether certain claims are *excluded* from arbitration, like the exclusion in *AT&T*, goes directly to the issue of arbitrability. Relying on *First Options* and its prior decision in *Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998), the Eleventh Circuit held that Section 10304 is a substantive arbitrability provision:

> It is well settled that the NASD eligibility requirement is a substantive requirement, and, absent clear and unmistakable evidence, the court determines whether claims are timely under the NASD Code. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties had agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.") (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)); *see also Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998) ("[Section] 15 of the NASD Code is not a procedural statute of limitations but a substantive eligibility requirement, determining the arbitrability of a given claim.").

App. 5 (footnote omitted).[8]

The conclusion reached by the Eleventh Circuit derives from the plain meaning of the words used in Section 10304:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be shown or selected." Webster's Third New International Dictionary 736 (1966). "Submission" is defined as "the act of commi[tting something] for consideration, study or decision."

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8. In July 1996, the NASD published a new NASD manual which, among other things, assigned a new numerical system to the NASD Code of Arbitration Procedure. Under the newer version of the Code, the former NASD Code § 15 is now labeled § 10304. App. 5, n.1.

PaineWebber Inc. v. Hartmann, 921 F.2d 507, 513 (3d Cir. 1990). This Court has described arbitrability in a similar fashion. *See, e.g., AT&T Tech.*, 475 U.S. at 648 ("a party cannot be required to *submit* to arbitration any dispute which he has not *agreed* so to *submit*.") (emphasis added; citations omitted); *First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contact between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have *agreed* to *submit* to arbitration.") (emphasis added); *id.* at 945 ("given the principle that a party can be forced to arbitrate only those issues it specifically has *agreed* to *submit* to arbitration. . . .") (emphasis added).

Hewing closely to *First Options*, the Eleventh Circuit looked to the language of the parties' arbitration agreements to determine whether there was clear and unmistakable evidence of an agreement to allow the arbitrators to decide arbitrability. The Court expressly applied the *First Options* standard in reaching its conclusion that the courts and not the arbitrators decide the Section 10304 issue, and there is nothing in the decision that conflicts with *First Options*.

This Court has repeatedly ruled on the manner in which courts should deal with the arbitrability issue, and granting certiorari in this case would add nothing to that jurisprudence. Even if the Eleventh Circuit's ruling that Section 10304 of the NASD arbitration rules concerns the arbitrability of the parties' dispute (because the provision excludes a category of claims), were somehow incorrect, that ruling is contract-specific and presents no question of national importance. This case hinged on resolving the precise language and effect of several provisions in the arbitration agreements and the NASD Code of Arbitration, and nothing more.

Finally, it is worth noting that, while Petitioners argue that the Eleventh Circuit's ruling undermines the intent of the NASD and the SEC to provide a speedy and inexpensive procedure for resolving disputes, Petition at 15-17, their argument actually demonstrates why a ruling by this Court interpreting the provisions of the NASD Arbitration Code is not warranted. If the Eleventh Circuit's interpretation of the NASD Code indeed turns out to have a negative impact on NASD arbitration, the NASD can revise its Arbitration Code. Indeed, the NASD has considered doing just that on several occasions over the years. *See Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956 (10th Cir. 2001) (noting that the NASD had proposed at least two amendments to § 10304 in 1994 and 1998 that would have resolved the "who decides arbitrability" issue, but that the latest proposal has either been withdrawn or not approved by the SEC).[9]

II. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedent.

Petitioners assert that the Eleventh Circuit's ruling is contrary to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) – a contention that is somewhat surprising, because Petitioners did not cite to *John Wiley* in their briefs

9. The NASD's sometimes conflicting views and comments on Section 10304 have affected how several courts have interpreted that section. *See, e.g., PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989) (considering 1988 NASD letter stating NASD would not process ineligible claims); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 596 (1st Cir. 1996) (noting that in 1996 the NASD's current view was that the NASD Code was silent on whether courts or arbitrators decide the eligibility of claims); *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 n.6 (D. Minn 1993) (noting NASD has taken conflicting positions on interpretation of § 15 [now §10304]), *aff'd*, 14 F.3d 1310 (8th Cir. 1994).

to the Eleventh Circuit. It is, in any event, a futile attempt to invoke the Court's jurisdiction.

The arbitration provision in *John Wiley* is fundamentally different from the six-year eligibility rule at issue here. *John Wiley* addressed the question whether procedural conditions precedent to filing an arbitration, *i.e.*, a four-week notice requirement before the claimant could file a grievance, had been satisfied. *John Wiley*, 376 U.S. at 555-59. The Court commenced its review by restating the general rule that courts are to decide the issue of arbitrability:

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

Id. at 546-47 (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds*, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

Nothing in the agreement at issue in *John Wiley* suggested that certain claims could be excluded from submission to arbitration – which is the language of the agreement construed by the Eleventh Circuit in this case. The actual holding of *John Wiley* disposes of Petitioners' argument:

> Once it is determined, as we have, that the parties *are obligated to submit the subject matter of the dispute of arbitration*, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

376 U.S. at 557 (emphasis added).

That is exactly what the Eleventh Circuit did in this case. The court determined whether the parties are obligated to submit the subject matter of the dispute to arbitration. The Eleventh Circuit was faced with an arbitration agreement that excluded certain claims from submission to arbitration – those claims arising from occurrences or events over six years.[10] Nothing in the *John Wiley* opinion conceivably could suggest that the Eleventh Circuit's application of *First Options* was in error. Nor does the Eleventh Circuit's ruling in any way jeopardize or contravene this Court's holding in *John Wiley*; the purported conflict simply does not exist.[11]

III. Petitioners' "Scope" and "Drafting" Arguments Are Contrary to *First Options*.

Petitioners seek to manufacture a conflict by citing to cases holding that questions regarding the scope of arbitration agreements are to be resolved in favor of arbitration.

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10. Petitioners' reliance on *Local 285 Service Employees Int'l Union v. Nonotuck Resource Assocs., Inc.*, 64 F.3d 375 (1st Cir. 1995), is similarly misplaced because it dealt with whether the parties complied with conditions precedent, such as those in *John Wiley*. That decision does not address an *eligibility* question, such as was addressed by the Eleventh Circuit here, under the specific language of Section 10304.

11. Petitioners also cite to a provision of the Uniform Arbitration Act as support for their proposition that arbitrators interpret time-limitations, waiver and laches defenses. Petition at 5. These provisions have no application here. Surely, Petitioners do not suggest that a party cannot impose a temporal limitation on the scope of the arbitration agreement. By its very wording, Section 10304 is not a statute of limitations or a laches defense. It is, as the Eleventh Circuit has noted, "a substantive limitation on the claims that may be submitted to arbitration." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995).

See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). As this Court made clear in *First Options*, however, the presumption in favor of arbitration decidedly does *not* apply to the unique question of arbitrability:

> This Court, however, has (as we have just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakabl[e]" evidence that they did so. In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" – for in respect to this latter question the law reverses the presumption.

First Options, 514 U.S. at 944-45. (citations omitted).

In yet another example of their misreading of *First Options*, Petitioners argue that the meaning of Section 10304, as well that provision's interplay with other NASD Code provisions, is ambiguous. Proof of this ambiguity, Petitioners claim, is revealed by cases construing the NASD Code. According to the Petitioners, if courts differ on the interpretation of an agreement, it means the agreement is *per se* ambiguous. Leaving aside whether Petitioners' rule of contract interpretation is – or should ever be – the law in any

jurisdiction, this contention should give Petitioners no solace. This is so because *First Options* holds that if an agreement is ambiguous, it means the court decides arbitrability. 514 U.S. at 944-45. And arbitrability is what this case is all about.

Petitioners also maintain that the Eleventh Circuit erred because it is the rule that arbitration agreements are to be construed against the drafter. Petition at 17.[12] This argument utterly fails to demonstrate a conflict in the precedent – if for no other reason than its tacit premise that the *courts* should interpret arbitration agreements. Moreover, Petitioners simply ignore the *First Options* presumption, under which arbitration agreements are construed presumptively to prohibit arbitrators deciding arbitrability.

Together with their scope argument, Petitioners assert that only the most "forceful evidence" can remove claims from the scope of broad arbitration obligations. Petition at 14. This argument, much like Petitioners' other contentions, is contrary to this Court's rulings. In *AT&T*, the Court noted that its "forceful evidence" standard only applies "[i]n the absence of any express provision excluding a particular grievance from arbitration." *AT&T*, 475 U.S. at 650. This case presents such an express provision that excludes a certain category of claims from arbitration.[13]

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12. Petitioners' argument necessarily assumes that *Smith Barney* drafted the NASD Code provisions at issue, an assumption that is bereft of any record support.

13. Petitioners' further argument that the Eleventh Circuit's ruling contradicts ERISA law is specious, primarily because their scatter-shot NASD arbitration claim *did not include an ERISA claim.*

In *First Options*, this Court set the standard as to which presumption applies when arbitrability is at issue. The Court need not re-address that settled issue – and Petitioners, who are not only wrong on the law and the presumption, present nothing to suggest that the Court should do so.

IV. New York Law Does Not Govern This Case

In yet another misplaced effort to attract the Court's attention to their Petition, Petitioners argue that the Eleventh Circuit erred by refusing to follow the New York courts' interpretation of Section 10304. Petitioners maintain that the Eleventh Circuit was obliged to follow *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). This argument, like Petitioners' other contentions, is at odds with this Court's prior rulings.

As a starting point, Petitioners do not dispute that this case is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, because the parties' underlying relationship involves interstate commerce. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court ruled that 9 U.S.C. § 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act." *Id.* at 24. The Eleventh Circuit followed federal substantive arbitration law and looked to *First Options*, and its own prior decisions for its holding. App. 5-11.

Moreover, this Court has previously addressed a New York choice-of-law provision in an arbitration agreement in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). In that case, Shearson challenged an award of punitive damages by an arbitration panel on the ground that a New York choice-of-law provision incorporated

New York arbitration law, which precluded arbitrators from awarding punitive damages. The Court held that the New York choice-of-law provision did not apply to the arbitration provisions:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration . . . .

Id. at 63-64.

Under *Mastrobuono*, a provision that requires the application of New York *substantive* law does not implicate New York *arbitration* law. Petitioners' arguments are at odds with the law previously announced by this Court in *Moses H. Cone* and *Mastrobuono*.

V. The Eleventh Circuit Properly Interpreted the Arbitration Agreements.

Most of Petitioners' remaining arguments focus on their contention that the district court and Eleventh Circuit erred in ruling that the Petitioners' claims were ineligible because they were brought more than six years after the occurrence or event giving rise to the claim. Contrary to Petitioners' contentions, the Eleventh Circuit expressly noted that the district court did not delve into the merits of the parties' dispute. App. 7-8. Rather, it looked to the claims to determine

whether they were eligible for arbitration. That involved the unremarkable process of reading the Petitioners' claims. This analysis necessarily involves an examination of the particular allegations brought by the Petitioner in the arbitration claim.

This Court has ruled that, in deciding the arbitrability issue, courts would have to look at the parties' arbitration agreement, and compare the agreement to the claims being brought to determine whether a particular claim is arbitrable. A prime example of this rule is the Court's holding in *AT&T*, 475 U.S. at 649, where the Court reversed the Seventh Circuit with directions to have the court examine whether a particular dispute was excluded from arbitration. Similarly, in *First Options*, the Court affirmed the Third Circuit, which had examined the record to determine whether the parties had agreed to arbitrate. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 514 U.S. 938.

For the courts to examine whether a claim is eligible for arbitration does not undermine arbitration policy – because, as the Court ruled, the primary policy is to enforce arbitration agreements as written:

> There is no strong arbitration-related policy favoring *First Options* in respect to its particular agreement here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties wishes, but to ensure that commercial arbitration agreements, like other contracts are enforced according to their terms. . . .

First Options, 514 U.S. at 947 (citations omitted).

Against that backdrop, the Eleventh Circuit ruled that the district court properly performed this function by examining each and every one of the Petitioners' claims, and finding that the claims arose out of the purchase of the limited partnerships more than six years before they filed their claim. App. 2, 7, 11. It was undisputed that:

- Petitioners' allegations concerning Smith Barney all involved limited partnerships purchased by Petitioner Thomas, prior to April 8, 1998 and by Petitioner Harvey, prior to August 31, 1990;

- Thomas did not maintain an investment account at Smith Barney after September 28, 1988;

- Petitioners' arbitration claim sought damages and interest running "from the date of purchase" of the limited partnerships at issue, thus establishing their claims arose from the *purchase* of the limited partnerships.

- Petitioners waited until July 1997 to file their claims with the NASD.

App. 2, 6, 15, 21, 25

The district court read the arbitration claim and found that all of the claims specifically sought damages and interest running from the time of purchase and commissions received from the transactions, and concluded that they all were point of sale or purchase claims. App. 21. This case-specific inquiry does not warrant this Court's intervention.

CONCLUSION

For the foregoing reasons, Smith Barney respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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